Vanderbilt Law Review

Volume 22
Issue 4 *Issue 4 - May 1969*

Article 7

5-1969

Book Reviews

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BOOK REVIEWS

AMERICAN CONFLICTS LAW. By Robert A. Leflar. Indianapolis: Bobbs-Merrill Co., Inc., 1968. Pp. lxxvi, 677. $19.50.

This volume is a revision of the 1959 edition and appears to be designed primarily for the student.[1] It is from that viewpoint that this review is written. The treatise is a comprehensive review of the troublesome and confusing subject of conflict of laws. Some parts are excellent, but others are so marred by inaccuracies and inadequacies that the balance weighs heavily against its general usefulness.

For the student, the principal benefits will flow from Chapter 10, "Choice-of-Law Theories," and Chapter 11, "Choice-Influencing Considerations." In these two chapters, covering little more than 60 pages, the author has brought into focus the historic developments of the past 40 years. There is a complete, but succinct, survey of Beale's work and the provisions of Restatement 1; the criticisms and contributions of Cook and Lorenzen; the recent developments principally associated with Currie, Ehrenzweig and Cavers; and the tribulations of the proposed Restatement 11. These chapters should be required reading for all new conflicts students to whom this historic process is unknown, these names meaningless, and the subject matter an esoteric mystery expressed in incomprehensible jargon.[2]

Unfortunately the remainder of the volume does not measure up to the standards of Chapters 10 and 11. There are two instances where the text cites opinions of a California intermediate appellate court, although the decisions of that court were vacated by hearing and subsequent decisions by the California Supreme Court.[3] In one instance this fact is noted, but in the other it is not, and the superseded opinion is cited as law. This may be a minor matter to some, but to one reared in the California tradition, once a hearing has been granted after decision by the court of appeals, that court's decision ceases to exist and may not be cited or used in any fashion.

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1. Some copies have the words "Student Edition" embossed on the cover; however, the text appears to be identical with those copies not so identified.

2. *See* Prosser, *Interstate Publication,* 51 MICH. L. REV.959, 971 (1953).

3. Myrick v. Superior Ct., 41 Cal. 2d 519, 256 P.2d 348 (1953) *cited at* 47 n.7 as indicating that the opinion was affirmed by the California Supreme Court; Kubon v. Kubon, 323 P. 2d, 504 (1958) *cited* at 51 n.10. This citation does not indicate subsequent hearing by and decision in the California Supreme Court in 51 Cal. 2d 229, 331 P.2d 636 (1958).

The leading cases of the past two decades on the subject of judicial jurisdiction receive superficial treatment that is more likely to hinder than help the student. *Hanson v. Denckla*[4] is one such case. The author suggests (p. 87 n.16) that it marked the outer limits of judicial power to adjudicate and identified their approximate location, but there is no discussion in the text as to what those outer limits might be or how their approximate location is to be determined. There is no mention of the fact that the decision was by a Court divided five to four, or that it is by no means clear that it was correctly decided or is likely to be followed in the future. The result is the creation of a false air of simplicity and certainty on a complex and uncertain matter.

Another such case is *Atkinson v. Superior Court*.[5] The end result of that decision is overstated by the assertion: "The holding was that the trust could be set aside without the trustee being before the court" (p. 96 n.5). In fact, the sole issue before the California Supreme Court in that case (an application for a writ of mandate to the trial court) was whether the trial court, pending trial of the action on the merits, had the power to grant a preliminary injunction or appoint a receiver to prevent or hold *future* payments being made by California employers to a New York trustee. There was no issue then before the court of power over property already in the possession of the trustee, of power over the trustee with respect to what he had done or might do with property that had already come into his possession, or of the validity of the trust itself.

In the treatment of consent or submission to jurisdiction by agreement in advance, there is no discussion of the requirement of actual notice (pp. 47-50). The implication from the text is that a person may consent to suit in a specified state and may waive personal service by appointing an agent in that state for such service (p. 47 nn.4 & 5); nothing is said about notice to the defendant. While *National Equipment Rental, Ltd. v. Szukhent*[6] is cited (p. 47 n.5), the text does not call attention to the language of the majority opinion that actual notice of the proceedings was given the defendants in time for their appearance, and that such "adequate and timely notice . . . [was] a prerequisite to a valid judgment."[7]

The discussion of section 1404(a) of Title 28 of the Judicial Code

4. 357 U.S. 235 (1958).
5. 49 Cal. 2d 338, 316 P.2d 960 (1957).
6. 375 U.S. 311 (1964).
7. *Id.* at 317-18.

(p. 114) contains a serious inaccuracy. It is there stated: "Under the well known section 1404(a), a federal district court may transfer a case *to the docket of any other federal district court in the United States,* where the case may be tried without new service"[8] (p. 114 n.14). This, of course, is not the law. Although there is a strong movement to amend the section to provide for such freedom in transfer of cases, the section still contains the limitation that transfer of a pending action can be only to the "district or division where it might have been brought." This limitation is not considered until page 160, where the correct version is given (p. 160 n.1).

The discussion of the effect of transfers under section 1404(a) on the application of the *Erie* doctrine[9] is incomplete (p. 160). The problem, simply stated, is whether in a 1404(a) transfer, the case remains a transferor court case for purposes of *Erie*, or whether it becomes a transferee court case for that purpose. The author cites *Van Dusen v. Barrack*[10] and tersely states: "The answer is now clear, at least for most situations. It is the law of the state in which the case was originally and properly filed" (p. 162 n.12). Two sentences from the opinion are then quoted, and the text continues: "There may be exceptions to this rule, but none have yet been pointed out." There are four things wrong with this treatment. First, the use of the adverb "properly" in the text statement, without explanation, creates a serious ambiguity. Does the author mean "properly" in the sense of complying with court rules and payment of filing fees, or does he mean "properly" in the sense of a proper venue? This is crucial to an understanding of the problem. Second, there is an omission of the qualifying language in the Court's opinion:

> [W]e do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens*.[11]

Third, in view of this qualifying language, the answer is not clear for many situations, and fourth, two possible exceptions to the stated rule have been suggested in the Supreme Court's opinion.

The *Erie* doctrine[12] is inadequately treated. The implications in

8. Emphasis added.
9. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
10. 376 U.S. 612 (1964).
11. *Id.* at 639-40.
12. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

the text (pp. 150-56) are that *Erie* is applicable only when the case comes to the federal court by reason of diversity jurisdiction. Later, the text is confusing as to whether the applicability of *Erie* is determined from the source of the federal court's jurisdiction, diversity or subject matter, or from the nature of the particular issue as based on a state or a federal source.[13] This confusion continues as the *Erie* doctrine is discussed in connection with two other matters—recognition of foreign judgments and *forum non conveniens* in federal court diversity cases.

On the recognition of judgments of foreign courts, the author asserts that the "Erie rule *compels* federal courts to follow state law so that state rejection of retaliation against foreign judgments becomes binding in federal courts'"[14] (p. 172 n.6). The only case cited is a district court opinion;[15] a leading article suggesting that the contrary rule should prevail is unmentioned.[16] However, elsewhere in the text, it is suggested, as a possibility, that the recognition of foreign judgments could become a matter of federal common law, and thus binding upon the states (pp. 173-74). In view of other decisions dealing with *Erie* and federal issues in international matters,[17] decisions which are discussed elsewhere in the text (pp. 156-58, 174-76), it would seem clear that the recognition of foreign judgments is a federal matter on which the states would be bound to follow federal law.

On *forum non conveniens* in federal courts, the text states:

> It seems that the spirit of *Erie* and *Klaxon* would not be violated by holding that access to the federal forum is wholly a matter for federal law. In the rare case in which transfer to another federal court under § 1404(a) is not possible, so that dismissal for *forum non conveniens* reasons is the only relief that can be requested, *a federal court can usually formulate its own test for dismissal as easily as it can ascertain the state test* (p. 151).[18]

The result stated seems sound, but the reason given for it is strange and gives a distorted picture of the rationale for the *Erie* doctrine. It has never been suggested that the test for the application of *Erie* is the relative ease with which a federal rule can be formulated or a state

13. *Cf.* F. JAMES, CIVIL PROCEDURE 36 n.1 (1965). One of the most significant and penetrating discussions of this problem, the dissenting opinion in Wheeldin v. Wheeler, 373 U.S. 647, 653 (1963), is not mentioned.

14. Emphasis added.

15. Svenska Handelsbanken v. Carlson, 258 F. Supp. 448 (D. Mass. 1966).

16. Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 787-88 (1950).

17. Banco Nacional v. Sabbatino, 376 U.S. 398 (1964).

18. Emphasis added.

rule ascertained. The true basis for a federal rule on *forum non conveniens* is that it, the venue rules, and section 1404(a) all relate to the matter of the distribution of business within the federal judical system, and this is a matter for uniform federal determination without regard to the rule of the particular state in which the district court is sitting.[19]

Another subject on which the treatment is unsatisfactory, is the matter of constitutional limitations on the choice of law process. On several occasions, it is suggested that there is a relationship between the applicability of the due process clause in determining jurisdiction over the person and in determining choice of law. On page 87, the statement is made: "[T]he outer limits of legislative jurisdiction prescribed by such cases as *Home Insurance Co. v. Dick* are *at least relevant* to the judicial jurisdiction problem."[20] On page 122 the text reads:

> Due process approval of modern "long-arm statutes" which permit state courts to exercise judicial jurisdiction under the "fair play and substantial justice" test *runs parallel* to the current approval of similar choice-of-law freedom. Contacts sufficient to satisfy "fair play and substantial justice" for judicial jurisdiction under the due process clause will often satisfy whatever test (perhaps the same test) the same constitutional clause prescribes for legislative jurisdiction. . . . The questions of what law may govern and what court may act are *similar though not the same.* The lines that delineate the answers to the question seem to be converging but they have not merged.[21]

And finally, on page 135, the author states: "And there is the *obvious correlation* between the constitutional limits on choice of law in these 'legislative jurisdiction' areas and those imposed by the due process clause under the head of 'judicial jurisdiction.' "[22]

There are two faults with this discussion. One is that it ignores the majority opinion in *Hanson v. Denckla*,[23] which denied Florida the power to adjudicate issues concerning absent trustees, but suggested that Florida's interest was sufficient to justify application of Florida law to the substantive issue involved. The Court's language was:

> For the purpose of applying its rule that the validity of a trust is determined by the law of the State of its creation, Florida ruled that the appointment amounted to a "republication" of the original trust instrument in Florida. For choice-of-law purposes such a ruling may be justified, but we think it an

19. *See* Byrd v. Blue Ridge Cooperative, 356 U.S. 525 (1958).
20. Emphasis added.
21. Emphasis added.
22. Emphasis added.
23. 357 U.S. 235 (1958).

> insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant.[24]

This is distinctly different from the text treatment, and failure to refer to what is still the most recent Supreme Court expression gives a distorted picture. The other fault is that the text has used four different phrases to describe this purported relationship: "at least relevant," "runs parallel," "similar though not the same," and "obvious correlation." It would seem to one using words accurately, that there is a substantial difference between the concept expressed in the first two and the last two. When there is the added fact that nowhere is there any analysis or discussion of the underlying rationale for such relevance or correlation, the student might find this treatment more confusing than helpful.

There is another phase of the due process clause and the choice-of-law process that could have been clarified. The author, after discussing *Home Insurance Co. v. Dick*,[25] states: "No one suggests that the *Dick* case is likely to be overruled" (p. 125). To set the record straight, one authority has written that reliance on the *Dick* case is "highly dubious."[26] However, the majority view, which includes the Supreme Court, is in accord with the text, and, had it been noted that the Court has cited *Dick* with approval in two comparatively recent decisions,[27] the present status of that case would have been portrayed more accurately.

With respect of the full faith and credit clause and the choice-of-law process, *Hughes v. Fetter*[28] receives far less than satisfactory treatment. The text states: "The case that sets a pattern for full faith and credit compulsion based altogether on the 'public acts' part of the clause and statute is *Hughes v. Fetter*" (p. 199). The trenchant criticism of Currie and Schreter,[29] and the Supreme Court's own qualification of that decision in the subsequent case of *Wells v. Simonds Abrasive Co.*,[30] would seem to have placed *Hughes v. Fetter* in the category of an equal protection limitation and not a full faith and credit command. None of these subsequent matters is mentioned.

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24. *Id.* at 253.

25. 281 U.S. 397 (1930).

26. A. EHRENZWEIG, CONFLICT OF LAWS 142 n.8 (1959).

27. Clay v. Sun Ins. Office Ltd., 377 U.S. 179, 181-82 (1964); Van Dusen v. Barrack, 376 U.S. 612, 639 n.41 (1964).

28. 341 U.S. 609 (1951).

29. Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 45 (1960); Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 268 (1959).

30. 345 U.S. 514, 518 (1953).

There are other matters that pervade the volume and detract from the value of this work. One is the same frequent resort to Arkansas references that limited the scope of the earlier edition. An example is the discussion of usury (p. 379 n.4); while it might have been desirable to select cases from a single state to illustrate a point, Arkansas is hardly a representative state. Some other examples may be found in the discussion of full faith and credit application to state judgments (p. 178), equitable defenses to actions on judgments (p. 190), choice-of-law provisions in workmen's compensation acts (p. 225 n.2), the characterization process (p. 210 n.3), and an apparently peculiar rule on failure to serve process (p. 54 n.13).

Finally, this volume badly needs re-editing. Many matters are discussed several times at different places in the text and footnotes.[31] In some instances, repetition may be necessary because of relevance to different problems, but in such cases, the discussion should be consistent and the language reasonably consistent. As previously mentioned, this is not always the case.[32] In at least one instance, the repetition is inexcusable (pp. 243 n.1, 259 n.1).

This has not been a pleasant review to write. Many of us who teach in this field would welcome the opportunity to refer our students unqualifiedly to a treatise that would be reliable and helpful. I am afraid the present volume will not serve that purpose.

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31. *See, e.g.*, text accompanying notes 8-11, 18-19 *supra*.
32. *See* text accompanying note 20 *supra*.

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THE POLICY-MAKING PROCESS. By Charles E. Lindblom. Englewood Cliffs: Prentice-Hall, Inc. 1968. Pp. 122. $4.95 (Cloth), $1.95 (Paper).

Dr. Lindblom, who is Professor of Political Science and Economics at Yale University, has written a brief but comprehensive work on the vitally important and widely misunderstood subject of policy-making. The book is presented as part of The Foundations of Modern Political Science Series, which seeks "to shorten by a decade or more" the task of molding the knowledge of political science into "highly readable" form. Perhaps it would be going too far to claim that such an auspicious accomplishment has been achieved by Lindblom's slim volume, but the work should definitely prove

worthwhile reading for students and members of the general community who are interested in the factors which surround policy-making. The comparatively modest price in paperback is fortunate since it will facilitate distribution to the dwindling, but still sizeable, fraction of the populace which has not concocted a procedure for rendering its literature purchases tax deductible.

Members of the bar whose practice involves confronting agencies and officials who make public policy owe it to themselves, and to their clients, to familiarize themselves with the theories that are outlined in this book. Legal scholarship has characteristically devoted much attention to how the court system makes policy. Traditionally, much of this work has consisted of studying the court system as an arbiter of conflict between private parties. However, in modern times a growing fraction of the civil lawyer's workload involves competition between individuals, private institutions, and government. Increasingly, government means the federal government. In many areas of such practice, such as securities or food and drug law, the lawyer has failed if he becomes involved in courtroom litigation, regardless of its outcome. When he succeeds, it is through skillful filing-cabinet practice. An understanding of what makes the White House, the bureaucracy, and Congress reach policy determinations is essential. These institutions, as Lindblom shows, do not ignore each other when making policy. The lawyer must know how the action he is requesting will effect this relationship. Is it the type of decision which the authority in question can easily make, or will it require the authority to go outside its usual area of specialization or influence?

What has been said above is really just an assertion that here, as in most other areas, the lawyer can no longer think of himself as only a specialist in legal doctrine—if indeed he ever really could. In our society today, traditional occupations are fading. The policeman, the minister, and even the merchant and the barber, as well as the lawyer, no longer are allowed to perform narrow, well-defined functions. Everyone needs to be a generalist, at least in part. Consider, for example, what has happened in the area of criminal law: it has dissolved as an independent discipline to become interrelated with psychiatry, genetics, education, race relations, and other fields. Today no one can influence policy decisions in criminal law without affecting policy in one or more of these other "disciplines." The same is becoming true everywhere, and if lawyers act as though it were otherwise, they, like witchdoctors, will probably lose their influence. Even now they are tending to become obsolescent.

Lindblom's analysis concentrates primarily on policy-making in the federal government, though, as he notes, the same phenomena certainly are present to varying degrees in local and in private governments, such as the supercorporations. The role of "analysis" or study in the policy-making process is discussed at length. Lindblom then goes on to describe the devices that have been created for carving up power, the need for these devices, and the regulation of various delegations and divisions of power. This he terms the "play of power." He discusses the roles of lobbyists, citizens, and elections. Finally he considers the policy-maker as a preference creator, as opposed to an arbiter among competing preferences.

That is a lot of ground to cover. Lindblom has accomplished the task by drawing liberally from the writing of other scholars and incorporating their observations into the broader picture. In respect to each particular aspect of the process, footnotes indicate where the reader may seek a more thorough discussion. The effect is to present a great number of interesting points in sufficient detail to convey a basic understanding and to stimulate the reader's further curiosity. This is an excellent accomplishment, but it leaves the reader still in the dark as to what he may anticipate will happen to any particular "policy" issue he might inject into the policy-making process. He is told that some of a number of phenomena will come into play, but he is not enlightened as to which are more likely to dominate in given decision areas.

The problem is intimately related to the book's principal mystery. Professor Lindblom undertakes to describe the process of policy-making without ever defining the term "policy." Moreover, he elects not to call this fact to the reader's attention by any express device. This is noteworthy because in another instance he does call the reader's attention, by way of a footnote, to the fact that "power" is not and will not be defined. Did Lindblom remain silent on the meaning of "policy" because he believed that his readers would know and agree as to what he meant by "policy?" That is hardly likely, for if policy had a precisely definable meaning, to assume that readers know it would be inconsistent with the book's goal of popularizing. Many things that are more obvious are explained in abundant detail.

In the case of "power," Lindblom asserts that its meaning will become more clear as the discussion progresses. Perhaps he intends the same to be true regarding policy. That would amount to saying that policy is "no more than that which is made by the process I am about to describe." This is a possible explanation—in fact one

suggested by the book's dustcover advertising—but if so, it would then render the book trivial. There are decisions which "count," to use Lindblom's word. The fact that they do not emerge from a system just described does not mean there is no policy; it just indicates that you looked at the wrong process.

What is "policy?" Certainly it is not readily susceptible of credible definition. One need look no further than the inconclusive terms the dictionary contains on the subject. Perhaps it would be best to concede that "policy" is an ambiguous term which we apply to many categories of decisions or choices. The analyst's task then requires that he decide what types of decisions are the ones that count heavily. Suppose that after many professors have written books, foundations have sponsored studies, bureaucrats have delegated and cooperated, a commission has reported, and congressional committees have investigated, the President appears on nation-wide television. He announces that his administration has reached a determination that business conglomerates are undesirable and that they will be cut down to size. Has the administration established a policy? What if the next day the President sends Congress a budget asking for 1000 dollars to control conglomerates. If you were counsel for a conglomerate would you not feel that the administration's policy was to do nothing to control conglomerates? It is not at all clear that the process which led to the television policy and that which led to the budget request were the same. One would not want to spend much time on the first if the two processes are in fact different. This is why it is valuable to identify which decisions count before analyzing how they evolved. Who knows, it may be that whole branches of our federal government engage in processes that do not count at all.

In some respects, *The Policy-Making Process* is an expansion of Lindblom's thesis in his famous article, "The Science of 'Muddling Through,'" and something of a precis of ideas contained in such previous books as *The Intelligence of Democracy; Politics, Economics, and Welfare;* and *A Strategy of Decision.* The essential message of the article, and of the book under review, is that policy-making in American government cannot be reduced for descriptive or analytical purposes to a neat formula or to one model. Although he fails to define the word "policy," it is evident that he thinks of it as the outcome of a process of decision-making, not as an input. It should be noted that lawyers often think of the "policy" aspects of a given decision, say of the Supreme Court, but when doing so they are looking to policy as an input. Policy as outcome is simply too complex for Professor Lindblom to find general principles.

But quite obviously this will not do. Lawyers, as well as political scientists, economists, and others, need to be able to understand how public policies are made if they are to do their jobs effectively. Furthermore, some idea of policy-making is vitally necessary in legal education. How, for example, can Constitutional Law, Administrative Law, Labor Law, or Corporations be taught without some adequate appreciation of policy-making? They cannot, simply because the name of the game in many of the substantive areas of those courses is policy making.

But the usual fodder served up in the nation's law schools, in the usual casebooks or coursebooks, simply does not give the necessary insights into the process. For that matter, the very term, "policy," is often used and seldom defined in legal literature. Clearly, it is, as has been said, a term of multiple reference; it can be the outcomes of decisional processes, or it can be one of the inputs into those same processes. Legal scholars have not as yet produced the systematic and comprehensive studies of policy that are needed to provide greater understanding of the legal process.

The value of this volume and of other works on policy-making is that attention is directed toward more than the judicial review aspects of the public administration. For students of that amorphous bag of high-level abstractions called "administrative law," Lindblom's book should be required reading. It will not fill the gaps left by casebook treatment of the public administration, but it will help.

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